SUPREME COURT OF NOVA SCOTIA

Citation: *Ogilvie* v. *Windsor Elms Village for Continuing Care Society*, 2022 NSSC 144

Date: 20220520
Docket: Ken. No. 406961
Registry: Kentville

Between:

Sharon Ogilvie

Plaintiff

v.

Windsor Elms Village for Continuing Care Society

Defendant

DECISION
(PREJUDGMENT INTEREST)

Judge:	The Honourable Justice John Keith
Heard:	September 28 to October 20, 2020
Written Decision:	January 26, 2021
Counsel:	Sharon L. Cochrane for the Plaintiff Blair Mitchell for the Defendant

By the Court:

[1] This decision resolves the final issues surrounding the rate of prejudgment interest and the period of time during which this interest rate accrued and is now payable to the Plaintiff.

Jurisdiction

[2] Section 41(i) of the *Judicature Act*, R.S.N.S. 1989, c. 240 confirms the Court's jurisdiction to award prejudgment interest:

> 41(i) in any proceeding for the recovery of any debt or damages, the Court shall include in the sum for which judgment is to be given interest thereon at such rate as it thinks fit for the period between the date when the cause of action arose and the date of judgment after trial or after any subsequent appeal…

[3] Section 41(k) of the *Judicature Act* confirms the Court’s discretion to reduce either the rate of prejudgment interest or the period for which prejudgment interest is payable; and it lists the statutory preconditions for assessing whether any such reduction is appropriate in the circumstances.

Rate of Prejudgment Interest

[4] As indicated, Section 41 of the *Judicature Act* confirms the Court’s discretion to establish a prejudgment interest rate as it sees fit for a certain period of time leading up to judgment.

[5] Civil Procedure Rule 70.07 provides for a presumptive interest rate of five percent (5%) per year calculated simply “unless a party satisfies a judge that the rate or calculation should be otherwise.”

[6] Paragraph 2 of Practice Memorandum No. 7 provides further guidance for determining prejudgment interest rates and, more specifically, the evidence that bears upon whether the presumptive 5% prejudgment interest rate should be :

> 2. Evidence to Calculate Rate of Interest.
>
> (a) Counsel shall strive to agree upon a rate prior to the conclusion of the trial, which rate the court may, but is not bound to accept.
>
> (b) In the event counsel cannot agree upon a rate prior to the conclusion of the trial, counsel should place before the court evidence upon which the court may arrive at a rate of interest which is proper. Such evidence shall include the prevailing rates of interest for the relevant period of time, which, it is suggested, be in the form of

> a table prepared and introduced into evidence showing the average rates of interest for one (1) year or two (2) year term deposits or treasury bills. The table shall show the various rates existing during the relevant period and the calculation of the average rate.

[7] In this case, the Plaintiff seeks prejudgment interest at the presumptive 5% interest rate. In support of that argument, Plaintiff's counsel further notes that the Plaintiff was required to withdraw money from her pension due to the termination of her employment and that this would have been unnecessary if the Defendant had provided proper notice. She states that the rate of return for these pension funds exceeded 5.0%.

[8] Counsel for the Defendant proposes an interest rate of 2.9% based on existing case law which includes details regarding the prevailing deposit rates over the relevant period of time.

[9] In my view, a prejudgment interest rate of 2.9% is justifiable and appropriate in the circumstances. My reasons include:

1. In my view, a 2.9% interest rate compares favourably with the prejudgment interest rates over similar periods of time (see *Matthews* v *Ocean Nutrition Canada Limited*, 2022 NSSC 118 and *Trimar Promotional Products* v *Milner*, 2021 NSSC 98); and

2. Under Practice Memorandum No. 7 (2)(b), prejudgment interest is based on rates of interest for deposits or treasury bills - and not rates of return on investments. Using these independent and relatively uncontroversial measurements to determine prejudgment interest promotes efficiency and consistency. And it mitigates the risk of an unjust windfall or having the calculation of prejudgment interest becoming complicated and highly individualized – with the parties debating how a successful litigant might (or might not) have invested funds to which they may have been owed prior to trial. On this point and while it is true the Plaintiff did withdraw pension funds, I also note that there are a number of reasons for this decision including the Plaintiff's decision to pursue a career change after her employment with Windsor Elms.

Duration of Prejudgement Interest

[10] The Plaintiff says that prejudgement interest should be paid from May, 2012 to November, 2021 – a period of 9 years and 6 months. The Defendant says that prejudgment interest should be capped at 3 years.

[11] Section 41(i) of the *Judicature Act* states that prejudgment interest applies "for the period between the date when the cause of action arose and the date of judgment after trial or after any subsequent appeal." However, as indicated, the Court retains the discretion to reduce that period if there has been undue delay by the party claiming prejudgment interest. The party seeking to reduce the time during which prejudgment interest is payable has the burden of establishing undue delay by the claimant.

[12] Here, the Defendant proposes that prejudgment interest be capped at 3 years. I note that this period of time (3 years) is consistent with Justice Davison's comment at paragraph 55 of *Holland* v. *Midland Walwyn Capital Inc*., 1993 CarswellNS 329 (S.C.):

> 55 In this case, in my view, there has been undue delay. Five years have passed since the cause of action arose. Counsel traded recriminations about the cause of the delay but both parties, by use of the rules of court, had the opportunity to advance the proceeding with more dispatch. It is in the interest of a plaintiff to do so and this is recognized by the terms of section 41(k). **In my view in the absence of good reason, systemic or otherwise, the court should not consider a period of more than three years when awarding interest.**
>
> [emphasis added]

[13] Justice Davison's comment is an expression of his view in the circumstances of that particular case. It does not restrict or limit the Court's discretion, and it does not absolve or lift the evidentiary burden from the party alleging undue delay.

[14] It is necessary to consider the circumstances of this particular case. The following timeline is an appropriate starting point:

1. The Plaintiff was terminated without cause on May 24, 2012. I agree with the Plaintiff that her cause of action arose on that date and any prejudgment interest calculation would begin on that date;
2. The Plaintiff filed her claim in a timely manner, on September 12, 2012;

3. The action was not set down for trial until a Date Assignment Conference ("**DAC**") was convened on October 25, 2018 – about 6 years and 6 weeks after the action had begun;
4. The original trial was scheduled to begin November 13, 2018 but was adjourned at the Defendant's request until September 28, 2020 because certain key witnesses had become unavailable;
5. The trial decision was rendered on January 26, 2021. There was no appeal.

[15] None of the time between the October 25, 2018 DAC and the decision on January 26, 2021 (2 years and 3 months) should be considered undue delay. The time between the DAC and trial is a function of the Court's schedule and, in part, problems related to the Defendant's (not the Plaintiff's) witnesses.

[16] The issue becomes: was there any undue delay during the 6 years and 6 weeks which elapsed between September 12, 2012 (when the claim was filed) and October 25, 2018 (when the DAC occurred)? If so, how much?

[17] In my view, there was some undue delay but that finding is mitigated by the following considerations:

1. Parties are obviously entitled to time to complete the required procedures necessary to set matters down for trial (e.g. pleadings, disclosure, and discovery). Indeed, these matters must be completed before an action can be set down for trial (see CPR 4.13). Moreover, for example, a Prothonotary must make a motion to dismiss a defended, unexpired action for delay, but that obligation is triggered only ig no trial date is set and no request for date assignment conference is filed within 5 years after the action is filed;
2. Counsel for the Plaintiff makes a number of compelling arguments confirming that this passage of time between September 12, 2012 and October 25, 2018 was not solely due to pure inactivity on the part of the Plaintiff; and
3. Some delay might be attributed to the Plaintiff's prior counsel. By way of background, the Plaintiff's original counsel left the firm shortly after her claim was filed and the matter was transferred to another lawyer at the same firm. From that point, there was some delay until the Plaintiff took steps to transfer the file from that second solicitor to her current

> counsel who moved the matter forward with relative despatch. I acknowledge that a question arises as to how much of this type of delay involving counsel must now be laid at the feet of the Plaintiff personally, in terms of depriving her of prejudgment interest. On the one hand, the problem is not entirely of the Plaintiff's making. On the other hand and while it may have been within the Defendant's power to set the matter down for trial, responsibility for moving an action forward ultimately lies with the party who brings the action (i.e. the Plaintiff).

[18] In the circumstances of this case, in my view, the matter should have been set down for trial within 4.5 years. It would be unjust to hold the Defendant responsible for paying prejudgment interest beyond that. The additional time between scheduling trial dates and the commencement of trial should not be held against the Plaintiff.

[19] Overall, prejudgment interest would be payable over a period of 6 years and 9 months. In closing, I note that the duration of prejudgment interest must be determined based on the unique facts of each case. However, from a broader, systemic perspective, this period of time is not inordinate. For example:

1. In *Boutilier* v *Percy*, 2011 NSSC 307, prejudgment interest was limited to 4 years; however, that case did not involve an adjournment of trial dates;
2. In *Mielke* v *Harbour Ridge Apartment Suites Ltd.*, 2011 NSSC 313, there was almost 11 years between the cause of action and the judgment. The Court ultimately permitted prejudgment interest for 6 years having regard to a delay in reporting the incident;
3. In *Couse* v. *Goodyear Canada Inc.* (2005), 2005 CarswellNS 112, 2005 NSCA 46 (N.S. C.A.), the Court of Appeal confirmed prejudgment interest for 6 years in a matter than did not involve a trial adjournment;
4. In *Tapics* v. *Dalhousie*, 2018 NSSC 273, 2018 CarswellNS 813 (N.S. S.C.), the Court awarded prejudgment interest at 5 years and 5 months, with 4 months being deduced for delays related to the filing of an amended affidavit. Again, this case did not involve a trial adjournment; and

5. *Matthews* v *Ocean Nutrition Canada Limited*, 2022 NSSC 118, the cause of action arose on July 18, 2012. The trial decision was released on January 20, 2017 with additional reasons released on May 12, 2017. Excluding subsequent appeals that eventually ended in the Supreme Court of Canada, the amount of time to take the matter to the additional and final trial reasons released May 12, 2017 was about 4 years and 10 months. No time was lost due to trial adjournment although, in this case, 6 months was deducted for initial delay.

Conclusion

[20] The Plaintiff is entitled to:

1. Prejudgment interest for 6 years and 3 months at an interest rate of 2.9%, calculated simply and not compounded;
2. Post judgment interest at a rate of 5% from January 26, 2021 forward (i.e. the date of the judgement). January 26, 2021 is the date the judgment arose and calculating post-judgement interest from this point forward is, in my view, consistent with Section 2 (1) of the *Interest on Judgment Act*, R.S.N.S. 1989, c. 233, as amended which states: "Until it is satisfied, every judgment debt shall bear interest at the rate of five per cent per annum or, where another rate is prescribed pursuant to subsection (2), at that other rate."

Keith, J